



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FILED

08-13-07
04:59 PM

Application of Southern California Edison Company (U-338-E) for Approval of Economic Development Rates.

A.04-04-008
(Filed April 5, 2004)
(Rehearing Granted May 25, 2006)

Application of Pacific Gas and Electric Company to Modify the Experimental Economic Development Rate (Schedule ED) (U 39 E).

A.04-06-018
(Filed June 14, 2004)
(Rehearing Granted May 25, 2006)

Application of Southern California Gas Company (U 904 G) for Approval of a Long-Term Gas Transportation Agreement with Guardian Industries Corp.

A.05-10-010
(Filed October 7, 2005)
(Discount Issues)

**JOINT OPENING COMMENTS
OF DRA, TURN, AGLET, LATINO ISSUES FORUM, DISABILITY
RIGHTS ADVOCATES, AND THE ENVIRONMENTAL CENTER OF SAN
LUIS OBISPO ON THE ALTERNATE PROPOSED DECISION OF
PRESIDENT PEEVEY**

I. INTRODUCTION

Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, the Division of Ratepayer Advocates ("DRA"), The Utility Reform Network ("TURN"), Aglet Consumer Alliance ("Aglet") Latino Issues Forum ("LIF"), Disability Rights Advocates, and the Environmental Center of San Luis Obispo ("ECOSLO") (collectively the "Coalition to Protect Public Purpose Funding" or "Coalition") hereby submit their

joint opening comments on the Alternate Proposed Decision of President Peevey (“AltPD”). The Coalition fully supports the Proposed Decision of ALJ Barnett (“PD”) and a substantial part of the AltPD, which is identical to the PD. However, the Coalition respectfully submits that the AltPD commits legal error on the issue which the AltPD decides differently than the PD – the AltPD’s grandfathering of discounted contracts entered into prior to the Commission’s order granting rehearing of Decision (D.) 05-09-018.

Both the PD and the AltPD correctly find that, under the statutory framework establishing the Public Purpose Program surcharges (“PPP surcharges”) set forth for California electric utilities in Sections 381, 382, 399-399.9, 739.1 and 739.2 of the California Public Utilities Code and for California natural gas utilities in Sections 739.1, 739.2 and 890-899 of the California Public Utilities Code,¹ the Commission must direct all California electric utilities and all California natural gas utilities, including Pacific Gas and Electric Company (“PG&E”), Southern California Edison Company (“SCE”), Southern California Gas Company (“SoCalGas”) and San Diego Gas & Electric Company (“SDG&E”), to collect the statutorily-mandated PPP surcharges from each of their distribution customers. The only exceptions are for the explicit exemptions set forth in the statutory provisions establishing the PPP surcharges.²

The PD and AltPD correctly find that the PPP surcharges and the Department of Water Resources (“DWR”) charges under Section 366.2(d)(1), the ongoing Competitive Transition Charge (“CTC”) under section 740.4, and the nuclear decommissioning charge under Section 379 are nonbypassable, which means that they cannot be discounted. Quoting the applicable provisions of the California Public Utilities Code, the PD and the

¹ All statutory references herein are to the California Public Utilities Code unless otherwise indicated.

² Because the California Alternate Rates for Energy (“CARE”) program is a legislatively-mandated public purpose program under Sections 739.1 and 739.2, which provides financial assistance to low-income ratepayers through a discount in their rates, these ratepayers are exempt from the CARE component of the electric or natural gas PPP surcharge (*i.e.*, they do not pay for their own discount) but they do pay for other components of the PPP surcharge. There are other explicit statutory exemptions for the natural gas PPP surcharges in Sections 896 and 898.

AltPD conclude that the statutory language imposes a mandatory obligation that every customer “shall” pay the “nonbypassable” charges. Nevertheless, the AltPD states, “SCE claims that parties have acted in good faith reliance on the rate structure approved in D.05-09-018, and, as such, those executed contracts should not be disturbed. We agree.” (Alternate Proposed Decision, p. 32.)

Although the Coalition appreciates the AltPD’s requirement that prospectively the utilities may not discount the nonbypassable charges, the Coalition respectfully submits that the Commission has no authority to approve the previously executed contracts, which are inconsistent with the statutory mandates.

II. Discussion

A. The AltPD Is Legally Erroneous, Because the Commission Cannot Act Contrary to Statutorily-Mandated Obligations

The AltPD states that “we cannot discount nonbypassable charges [or] any other components of service prohibited by law.” (Alternative Proposed Decision, p. 20.) While the AltPD recognizes that the Legislature has prohibited the Commission from discounting nonbypassable charges, it allows certain contracts to maintain discounts to the nonbypassable charges. The AltPD’s conclusion is not based on law, but only on the parties’ good faith reliance upon the Commission’s D.05-09-018.

It is immaterial whether the contracts were entered into in good faith reliance on D.05-09-018, because the Commission had no lawful authority to allow the utilities to enter into contracts with a discounted PPP surcharge. As both the PD and AltPD recognize, these nonbypassable surcharges are mandatory and nondiscountable under the above-mentioned sections of the California Public Utilities Code. *See, e.g.*, Sections 399.8(b)(1) (“Every customer of an electrical corporation shall pay a nonbypassable system benefits charge”) and 399.8(c)(1) (“The commission shall require each electrical corporation to identify a separate rate component to collect revenues.... The rate component shall be a nonbypassable element of the local distribution service.”) As Section 14 of the California Public Utilities Code states, “ ‘Shall’ is mandatory.”

The California Supreme Court has made clear that the Commission cannot disregard express legislative directions to it, or restrictions upon its powers. *See Assembly v. Public Util. Com.* (1995) 12 Cal. 4th 87, 100, 103; *see also Pacific & Tel. Co. v. Public Util. Com.* (1965) 62 Cal. 2d 634, 653. When there is a statutory mandate specifically addressing a matter, the Commission does not have discretion to grant exceptions to the statutory mandate. *See Assembly v. Public Util. Com.*, 12 Cal. 4th at 101. Administrative agency actions which are inconsistent with the acts of the Legislature are void. *See Carmel Valley Fire Protection District v. State of California* (2001) 25 Cal. 4th 287, 300. Thus, when the Commission has issued a decision that is inconsistent with the statute, its decision has been annulled. *See Assembly v. Public Util. Com.*, 12 Cal. 4th at 104.

In the instant proceeding, the AltPD's attempt to allow discounting for certain contracts is contrary to the mandates in Sections 381, 382, 368(b), 399-399.9, 739.1, and 739.2, which require all electric customers to pay their fair share of the PPP surcharge. The AltPD's attempt to grandfather the discounted contracts is contrary to legislation and therefore impermissible as a matter of law.

B. The AltPD Errs by Assuming Good Faith Reliance by Parties on the Commission's D.05-09-018

The central issue of these combined proceedings is whether the Commission has the authority to allow the utilities to discount the PPP surcharges. The Parties have been on notice of this issue since the electric utilities included these nonbypassable charges in the floor for their rates in their Joint Proposal. Although the Commission's D.05-09-018 erroneously modified the Joint Proposal to allow discounts for the nonbypassable charges, it was not a final order, because Aglet filed a timely request for rehearing in this matter. Moreover, in D.06-05-042, the Commission granted limited rehearing to consider whether the floor price under the utilities' Joint Proposal should include the public purpose program surcharge. (AltPD, p. 2.) The parties were well aware that this proceeding could result in the floor price including all of the nonbypassable PPP surcharges without discounts.

In addition, the PD correctly states that the Agreements at issue clearly provided that rates are subject to change by the Commission. (PD, p.32.) With such wording in the contracts, and considering the context of the entire case, including the rehearing phase, parties to the contracts were on full notice that their contracts could be modified. Thus, they did not reasonably rely upon D.05-09-018 to assume that they ultimately would be entitled to the discounts in their nonbypassable surcharges. They should have known that the outcome of this litigation could result in losing their discounts to the PPP surcharges.

III. CONCLUSION

WHEREFORE, for all the foregoing reasons, the Coalition respectfully submits that the AltPD should not approve the discounting of the nonbypassable charges as provided in the existing contracts. The Commission should approve the PD and withdraw the AltPD or change the AltPD to be completely consistent with the PD by requiring this unlawful feature of the existing contracts to be modified.

////////

////////

////////

////////

Respectfully submitted,

August 13, 2007

/s/ RASHID A. RASHID

BOB FINKELSTEIN
Executive Director
NINA SUETAKE
Attorney

THE UTILITY REFORM NETWORK
711 Van Ness Avenue , Suite 350
San Francisco, CA 94102
Phone: (415) 929-8876
Fax: (415) 929-8876
Email: Bfinkelstein@turn.org
Email: Jweil@aglet.org

JAMES WEIL
Director
AGLET CONSUMER ALLIANCE
PO Box 37
Cool, CA 95614
Phone: (530) 885-5252
Fax: (530) 885-5252

MESLISSA W. KASNITZ
Managing Attorney
DISABILITY RIGHTS ADVOCATES
2001 Center St., Third Floor
Berkeley, CA 94704
Telephone: 510/665-8644
Fax: 510/665-8511
TTY: 510/665-8716
Email: pucservice@dralegal.org

Rashid A. Rashid
Staff Counsel

ATTORNEY FOR THE DIVISION OF
RATEPAYER ADVOCATES
CALIFORNIA PUBLIC UTILITIES
COMMISSION
505 Van Ness Ave.
San Francisco, CA 94102
Phone: (415) 703-2705
Fax: (415) 703-2262
Email: rdh@cpuc.ca.gov

ENRIQUE GALLARDO
Attorney
LATINO ISSUES FORUM
160 Pine Street, Suite 700
San Francisco, CA 94111
Email: enriqueg@lif.org
Phone: (415) 547-7550
Fax: (415) 284-7222

MORGAN RAFFERTY
Executive Director
ENVIRONMENTAL CENTER OF SAN
LUIS OBISPO
1204 Nipomo Street
San Luis Obispo, Ca 93401
Phone: 805.544.1777
Fax: 805.544.1871
Email: morgan@ecoslo.org

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of “**JOINT OPENING COMMENTS OF DRA, TURN, AGLET, LATINO ISSUES FORUM, DISABILITY RIGHTS ADVOCATES, AND THE ENVIRONMENTAL CENTER OF SAN LUIS OBISPO ON THE ALTERNATE PROPOSED DECISION OF PRESIDENT PEEVEY**” on all know parties to A.04-04-008, A04-06-018, and A.0510-010 by using the following service:

[X] **E-Mail Service:** sending the entire document as an attachment to an e-mail message to all known parties of record to this proceeding who provided electronic mail addresses.

[X] **U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Dated at San Francisco, California this 13th day of August, 2007.

/s/ ANGELITA MARINDA

Angelita Marinda

SERVICE LIST
(A.0404008, A0406018, A0510010)

kmccrea@sablaw.com
owein@nclcdc.org
francis.mcnulty@sce.com
james.lehrer@sce.com
amsmith@sempra.com
mshames@ucan.org
morgan@ecoslo.org
nsuetake@turn.org
bfinkelstein@turn.org
rhd@cpuc.ca.gov
enriqueg@lif.org
kck5@pge.com
lex@consumercal.org
thaliag@greenlining.org
pucservice@dralegal.org
jweil@aglet.org
dcarroll@downeybrand.com
donna@citizenshealth.org
rprince@semprautilities.com
liddell@energyattorney.com
sberlin@mccarthyllaw.com
chrism@mid.org
joyw@mid.org
agc@cpuc.ca.gov
beg@cpuc.ca.gov
lmb@cpuc.ca.gov
ner@cpuc.ca.gov
nil@cpuc.ca.gov
rsk@cpuc.ca.gov
rab@cpuc.ca.gov
alward@energy.state.ca.us